

the duty thus imposed upon him. But then to entitle himself to claim toll upon the ground of his liability, he must shew that he has been actually thus bound; for, if he be not encumbered with any such duty he can make no claim to toll of any sort. *Hale de Portibus*, 78; *Smith v. Shepherd*, *Cro. Eliz.* 710; *James v. Johnson*, 2 *Mod.* 143; *Warrington v. Mosely*, 4 *Mod.* 320; *Truman v. Walgham*, 2 *Wils.* 296; *Brett v. Beales*, 22 *Com. Law. Rep.* 349; *Mayor of Yarmouth v. Eaton*, 3 *Burr.* 1402; *Colton v. Smith*, *Cowp.* 47.

But in this case, however enormous may have been the expense incurred by Dugan and McElderry; and whatever may have been their merits in making these wharves; the whole was nothing more than what was necessary to a faithful compliance with the terms of their contract of the 10th of February, 1794, from which, or any thing else here shewn, it does not appear, that they were under any sort of obligation to maintain and keep them in repair, after they had been once completed, according to the terms of their agreement. The benefit to which they looked, and which they actually derived from the costly work, so completed by them, was that of having an open street, and a free public wharf extending along a line of more than a thousand feet fronting on their lots, on which they could, and did, in fact, by themselves, or their lessees or vendees, erect valuable edifices. And this extensive benefit may fairly be considered as one to which, as prudent men, they might safely have looked for remuneration when they entered into this contract; and as one by which they have since been amply compensated for all their great expense and labor in building these valuable public wharves. There is, therefore, no ground upon which Dugan can be allowed to demand and receive wharfage for the use of these wharves.

It necessarily follows, from what has been said, not only that neither of these litigating parties have any right to demand and receive toll from any one for the use of these public wharves; but, that the doing so, by either of them, would be a violation of a public right; and yet it appears, from their own account of their proceedings, that they have, each of them, heretofore attempted to exact from, and, in many instances, have succeeded in imposing a tax, for their own emolument, upon the people who used these public wharves. To tolerate such a proceeding any longer would  
**384** \*be tacitly to sanction a wrong upon the public and the State; and therefore it must be put a stop to for the future. For, this Court, not only can in no case pronounce a judgment against any right of the State which appears upon the record; though not insisted on by any one on its behalf; but, after having thus ascertained, that neither of the litigating parties has any right, it devolves upon the Court, as a judicial duty, in all such cases to protect the interests of the State, and the rights of the people, thus manifested by the record, by all the means within its